have been the same, having regard to the absolutely overwhelming nature of the case for the prosecution. We are therefore satisfied that no substantial injustice has actually occurred and so we apply the proviso to s. 60 of the Courts of Judicature Act 1964, which says:

> Provided that the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occured.

Accordingly, we have no hesitation in dismissing these appeals and confirming the convictions and sentences of death passed against both the appellants.

TAI CHOI YU

v.

THE GOVERNMENT OF MALAYSIA & 2 ORS.

SUPREME COURT, KOTA KINABALU
TUN DATO' SERI HAJI ABDUL HAMID BIN HAJI OMAR LP,
TAN SRI DATO' MOHD EUSOFF BIN CHIN SCJ,
DATO' MOHAMED DZAIDDIN BIN HJ. ABDULLAH SCJ
[CIVIL APPEAL NO. 01-17-93]
15 FEBRUARY 1994

REVENUE LAW: Certificate issued under s. 104(1) of the Income Tax Act 1967 - Appellant not given notice to show cause why the certificate should not issue - Whether issuance of certificate was mala fide and against established principles of natural justice - Whether there was a requirement that appellant must be sent notice of the issue of the certificate at the time of or soon after the issuance.

STATUTORY INTERPRETATION : "Leaving Malaysia" - Income Tax Act 1967, s. 104(1) - Whether must be interpreted to mean leaving Malaysia permanently.

A total sum of RM246,482.39 was due and owing by the appellant as income tax. The Director General of Inland Revenue (DGIR) issued a certificate under s. 104(1) of the Income Tax Act 1967 (the Act) to the Director of Immigration requesting the latter to take action to prevent the appellant leaving Malaysia until he had settled the tax.

The appellant's application for a declaration that the certificate issued by the DGIR was null and void was dismissed by the High Court. (See [1993] 3 CLJ 394).

On appeal the main issue was whether the certificate issued by the DGIR was valid as the DGIR did not give the appellant the right to be heard before making a decision to issue the certificate and had only notified the appellant of the issuance of the certificate on 16 May 1991 although the certificate was issued on 27 June 1988.

Held:

[1] The appellant's submission that the words "leaving Malaysia" in s. 104(1) of the Act must be interpreted to mean leaving Malaysia

permanently was unacceptable. The words used in s. 104(1) of the Act are plain and clear and it would not be appropriate to read the word "permanently" into the section.

[2] The evidence shows that between June 1988 to April 1990, the appellant travelled extensively overseas and stayed longer in foreign lands than in Malaysia. In the circumstances the DGIR was justified in forming the opinion that the appellant would leave the country without settling his tax.

[3] The DGIR is not required by s. 104(1) of the Act to hear the appellant before making his decision. If a notice to show cause is issued to the appellant it would only serve as a warning of the action about to be taken against him, and this would afford him the opportunity to leave the country before the certificate could be issued, which would defeat the object and purpose of the certificate.

[4] Section 104(3) of the Act does not impose any time limit within which the DGIR must notify the appellant that a certificate had been issued under s. 104(1) of the Act. That being so the appellant has to be notified with all "convenient speed", which has been held by the Courts to mean reasonable time within which an act has to be done, but always having regard to the facts and peculiar circumstances of each case.

[5] The DGIR was aware that the Director of Immigration had not taken any action on the certificate because the appellant was allowed to leave on overseas travels until 22 April 1990 on which date the appellant was told by an Immigration Officer of the existence of the certificate. Once the appellant knew of the existence of the certificate the provisions of s. 115 of the Act would apply to him.

[6] In the circumstance the delay in the service of the notice under s. 104(3) of the Act, on the appellant, was not fatal so as to render the certificate null and void. To hold otherwise would only defeat the object and purpose of s. 104 of the Act and create great inconvenience in the implementation of this section.

[7] Since the certificate had been lawfully issued by the DGIR, the appellant's application must fail under s. 104(5) of the Act.

[Appeal dismissed with costs].

[Bahasa Malaysia Translation of Headnote]

UNDANG-UNDANG HASIL: Sijil perakuan dikeluarkan di bawah s. 104(1) Akta Cukai Pendapatan 1967 - Perayu tidak diberikan notis untuk menunjukkan sebab mengapa sijil tersebut tidak harus dikeluarkan - Sama ada pengeluaran sijil adalah mala fide dan bertentangan dengan prinsip-prinsip keadilan semulajadi yang telah lama bertapak - Sama ada terdapat keperluan bahawa perayu perlu dihantarkan notis pengeluaran sijil perakuan tersebut pada waktu atau sejurus selepas pengeluaran tersebut.

PENTAFSIRAN STATUT: "Meninggalkan Malaysia" - Akta Cukai Pendapatan 1967, s. 104(1) - Sama ada mesti ditafsirkan sebagai bermaksud meninggalkan Malaysia buat selama-lamanya.

Wang berjumlah RM246,482.39 adalah terhutang dan patut dijelaskan oleh perayu sebagai cukai pendapatan. Ketua Pengarah Jabatan Hasil Dalam Negeri (KPJHDN) telah mengeluarkan suatu sijil perakuan di bawah s. 104(1) Akta Cukai Pendapatan 1967 (Akta tersebut) kepada Pengarah Imigresen meminta beliau supaya mengambil tindakan menghalang perayu daripada meninggalkan Malaysia sehingga perayu menyelesaikan cukainya.

Permohonan oleh perayu untuk mengisytiharkan sijil perakuan yang dikeluarkan oleh KPJHDN sebagai batal dan tidak sah telah ditolak oleh Mahkamah Tinggi. (Sila lihat [1993] 3 CLJ 394).

Atas rayuan yang dibuat isu utama ialah sama ada sijil perakuan yang dikeluarkan oleh KPJHDN itu sah memandangkan KPJHDN tidak memberikan hak kepada perayu untuk didengar sebelum membuat keputusan bagi mengeluarkan sijil berkenaan dan hanya memaklumkan mengenai pengeluaran sijil perakuan tersebut kepada perayu pada 16 Mei 1991 walaupun sijil berkenaan dikeluarkan pada 27 Jun 1988.

Diputuskan:

[1] Penghujahan perayu bahawa perkataan "meninggalkan Malaysia" dalam s. 104(1) Akta tersebut mestilah ditafsirkan sebagai bermaksud meninggalkan Malaysia untuk selama-lamanya adalah tidak boleh diterima. Perkataan yang digunakan dalam s. 104(1) Akta tersebut adalah jelas dan ketara dan adalah

tidak wajar untuk membacakan perkataan "selama-lamanya" ke dalam seksyen tersebut.

[2] Daripada bukti yang terdapat didapati antara bulan Jun 1988 hingga April 1990, perayu telah membuat perjalanan ke luar negeri secara meluasnya dan tinggal di luar negeri lebih lama daripada tinggal di Malaysia. Dalam keadaan ini KPJHDN adalah berjustifikasi dalam berpendapat bahawa perayu akan meninggalkan negara ini tanpa menjelaskan cukainya.

[3] KPJHDN tidak dikehendaki oleh s. 104(1) Akta tersebut untuk mendengar perayu sebelum membuat keputusan. Jika suatu notis tunjuk sebab diberikan kepada perayu, ia akan berfungsi sebagai amaran mengenai tindakan yang akan diambil terhadap beliau, dan ini akan memberi peluang kepada perayu untuk meninggalkan negara ini sebelum sijil perakuan dapat dikeluarkan, dan ini akan mengecewakan matlamat dan tujuan sijil perakuan tersebut.

[4] Seksyen 104(3) Akta tersebut tidak mengenakan apa-apa had masa dalam mana KPJHDN perlu memberitahu perayu bahawa suatu sijil perakuan telah dikeluarkan di bawah s. 104(1) Akta tersebut. Jika begitu, perayu perlulah diberitahu dengan "seberapa segara yang boleh" yang mana diputuskan oleh Mahkamah sebagai bermaksud masa yang munasabah dalam mana sesuatu tindakan perlu dibuat, tetapi selalu mengambilkira akan fakta-fakta dan keadaan-keadaan yang pelik akan setiap kes berkenaan.

[5] KPJHDN sedar bahawa Pengarah Imigresen tidak mengambil sebarang tindakan ke atas sijil perakuan tersebut kerana perayu telah dibenarkan untuk ke luar negeri sehingga 22 April 1990 di mana pada tarikh tersebut perayu dimaklumkan oleh seorang Pegawai Imigresen mengenai kewujudan sijil perakuan tersebut. Sebaik sahaja perayu mengetahui mengenai sijil perakuan tersebut, peruntukan s. 115 Akta tersebut akan terpakai ke atasnya.

[6] Dalam hal ini kelewatan dalam menyampaikan notis di bawah s. 104(3) Akta tersebut, ke atas perayu, tidaklah membawa padah sehingga menyebabkan sijil perakuan tersebut sebagai terbatal dan tidak sah. Jika diputuskan sebaliknya, ia hanya akan mengecewakan matlamat dan tujuan s. 104 Akta tersebut dan menimbulkan kesulitan dalam melaksanakan seksyen ini.

[7] Memandangkan sijil perakuan tersebut telah dikeluarkan dengan sahnya oleh KPJHDN, maka permohonan perayu seharusnya gagal di bawah s. 104(5) Akta tersebut.

[Rayuan ditolak dengan kos].

Case referred to:

S. Kulasingam & Anor. v. Commissioner of Lands Federal Territory & Ors. [1982] CLJ 65/[1982] 1 MLJ 205 ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 103, 104(1), (3), (4)(a), (5), 115
Interpretation Acts 1948 and 1967, s. 54(2)
Land Acquisition Act 1960

For the appellant - Tai Choi Yu in person
For the respondents - Abd. Karim A. Jalil (Norbahari Baharuddin with him), SFC

JUDGMENT

Mohd Eusoff Bin Chin SCJ:

The High Court at Miri had under s. 106 of the Income Tax Act 1967 (hereinafter, the Act) adjudged a sum of RM231,016.95 as income tax due and payable by the appellant to the Director General of Inland Revenue, the second respondent (hereinafter, the DGIR). Subsequently, additional assessments were computed making the total tax due and payable to be RM246,482.39. The appellant made a few payments, leaving a sum of RM239,332.64 as still outstanding.

The DGIR, on 27 June 1988, issued a certificate under s. 104(1) of the Act to the Director of Immigration requesting the latter to take action to prevent the appellant leaving Malaysia until he had settled the tax. The certificate was not enforced immediately because the respondent was allowed to travel overseas until 20 April 1990.

The appellant had a valid passport which was due to expire on 9 September 1990. Because he often travelled out of Malaysia the pages in his passport had been fully used up. On 20 April 1990 he applied for the renewal of his passport. On 22 April 1990 upon inquiry made by the appellant on the position of the renewal of his passport, he was told by an Immigration Officer at Miri that the DGIR had issued a certificate under s. 104(1) of the Act, whereupon the appellant began negotiating with officers of the DGIR on the settlement of the unpaid tax. On 29 August 1990 the appellant agreed to pay

RM5,000 per month towards the outstanding tax provided that he was issued with a new passport. The DGIR informed the appellant that the certificate would be revoked only if the appellant furnished security under s. 104(4) (a) of the Act in the form of a bank guarantee for the amount of tax still outstanding. The revocation of the certificate would remove the obstacle so as to enable the Immigration Department to consider and issue to the appellant a new passport. No evidence was adduced to confirm that the appellant had furnished the required bank guarantee.

It was seven months later, that is, on 23 April 1991 that the appellant commenced an action in the High Court at Miri for a declaration that the certificate issued by the DGIR to the Director of Immigration dated 27 January 1988 was null and void as it was made contrary to s. 104 of the Act, *mala fide* and against established principles of natural justice; and consequently the Director of Immigration should not have acted on the certificate.

On 6 March 1993 the High Court at Miri dismissed the appellant's application with costs. [See [1993] 3 CLJ 394]. Hence this appeal.

Before us the main issue is whether the certificate issued by the DGIR on 27 June 1988 to the Director of Immigration under s. 104(1) of the Act was valid because the DGIR did not give the appellant the right to be heard, before making a decision to issue the certificate, and had served a notice of the issue of the certificate to the appellant very late on 16 May 1991. For convenience, we quote the relevant provisions of s. 104:

104. Recovery from persons leaving Malaysia.

(1) The Director General, where he is of the opinion that any person is about or likely to leave Malaysia without paying -

(a) all tax payable by him (whether or not due or due and payable);
(b) all sums payable by him under s. 103(4), (5) or (5A); and
(c) all debts payable by him under ss. 107A (2) or 109 (2) or 109B (2)

may issue to any Commissioner of Police or Director of Immigration a certificate containing particulars of the tax, sums and debts so payable **with a request for that person to be prevented from leaving Malaysia unless and until he pays all the tax, sums** and debts so payable **or furnishes security to the satisfaction of the Director General for their payment.**
(emphasis added)

(2) Subject to any order issued or made under any written law relating to banishment or immigration, any Commissioner of Police or Director of Immigration who receives a request under subsection (1) in respect of any person shall take or cause to be taken all such measures (including the use of reasonable force and the seizure, removal or retention of any certificate or identity and any passport, exit permit or other travel document relating to that person) as may be necessary to give effect to it.

(3) The Director General shall cause notice of the issue of a certificate under subsection (1) to be served personally or by registered post on the person to whom the certificate relates:

Provided that the non-receipt of the notice by that person shall not invalidate anything done under this section.

(4) Where a person in respect of whom a certificate has been issued under subsection (1) -

(a) produces a written statement signed on or after the date of the certificate by the Director General or an authorized officer to the effect that all the tax, sums and debts specified in the certificate have been paid or that security has been furnished for their payment; or

(b) pays all the tax, sums and debts specified in the certificate to the officer in charge of a police station or to an immigration officer,

the statement or the payment, as the case may be, shall be sufficient authority for allowing that person to leave Malaysia.

We also quote the contents of the certificate issued by the DGIR to the Director of Immigration:

Sijil Cukai Terhutang
(Certificate Of Tax In Default)
Di Bawah Seksyen 104 Akta Cukai Pendapatan 1967
(Under Section 104 Of The Income Tax Act 1967)

Nama: Tai Choi Yu
No. Kad Pengenalan: K641851
Tarikh Lahir: 13 February 1947

Saya sahkan disini bahawa pembayar cukai yang bernama di atas masih lagi berhutang kepada Jabatan ini sebanyak RM239,332.64 (Ringgit: Dua ratus tiga puluh sembilan ribu tiga ratus tiga puluh dua dan sen enam puluh empat sahaja) bagi cukai tahun taksiran 1979 (Tambahan), 1981 (Tambahan), 1982, 1983, 1984 (Tambahan), 1986 dan 1987.

Pada pendapat saya bahawa penama di atas akan atau berkemungkinan meninggalkan Malaysia tanpa membayar cukai tersebut.

Menurut s. 104 Akta Cukai Pendapatan 1967, saya memohon pihak tuan untuk mengambil langkah langkah yang perlu untuk menghalang Encik Tai Choi Yu daripada meninggalkan Malaysia sehingga cukai yang terhutang itu diselesaikan atau memberi satu jaminan yang boleh memuaskan pihak saya bagi menyelesaikan cukai tersebut.

"Berkhidmat Untuk Negara"
"Cintailah Bahasa Kita"

saya yang menurut perintah

t.t.
(Chew Cheng Tuan)
Pengarah Hasil Dalam Negeri
Sarawak.

One of the primary functions of the DGIR under the Act is to collect and recover assessed tax effectively, and to do that, he must employ all the modes of recovery authorised in Part VII (ss. 103 to 111) of the Act. Action under s. 104 is one of the authorised modes. It is the requirement of s. 103 of the Act that a person pays his assessed tax on the service of the notice of assessment on him failing which the DGIR may besides using all other authorised modes, proceed to recover in Court the assessed tax as a debt due to the Government, and if judgment is obtained, to execute the judgment.

Under s. 104(1) of the Act, the DGIR, if he is of the opinion that a person is about or likely to leave Malaysia without paying all tax payable by the person, is authorised to issue a certificate requesting the Director of Immigration to prevent the person from leaving Malaysia.

The appellant submitted that the words "leaving Malaysia" in s. 104(1) of the Act must be interpreted to mean leaving Malaysia permanently. We find that the words used in this section are plain and clear, and we do not think it appropriate to read the word "permanently" into this section. We are of the view that if that is the intention of Parliament such words as "permanently" or "with no intention of returning" would have been inserted after the words "leave Malaysia" in this section. But was there justification in the DGIR forming the opinion that the appellant was about or likely to leave Malaysia. The DGIR cannot read the mind of the appellant, and neither would the appellant tell the DGIR if he intends to leave Malaysia without settling his tax. The DGIR would have to base his opinion on information and reports received by him, and on knowledge gathered or acquired in the course of dealing with the appellant's tax affairs. The evidence in the appeal record shows that between June 1988 to April 1990, the appellant travelled extensively overseas and stayed longer in foreign lands than in Malaysia. In the circumstances we find that the DGIR was justified in forming the opinion that the appellant would leave the country without settling his tax.

The appellant submitted that the DGIR acted against the rules of natural justice. In other words, the appellant had not been given a notice to show cause why the DGIR should not issue the certificate. That, we feel is not the intention of the law because it would defeat the object and purpose of the certificate. If a notice to show cause is issued to the appellant it would only serve as a warning of the action about to be taken against him, and this would afford him the opportunity to leave the country before the certificate can be issued.

In *S. Kulasingam & Anor. v. Commissioner of Lands Federal Territory & Ors.*, [1982] 1 MLJ 205, the Federal Court, hearing a land acquisition appeal, held that since the Land Acquisition Act 1960 imposed no obligation on the acquiring authority to afford the land owner the opportunity to be heard before making a decision to acquire the land, the owner could not claim the right to be heard under the rules of natural justice. Here too, the DGIR is not required by s. 104(1) to hear the appellant before making his decision.

We are, therefore, of the view that the DGIR is not bound to give notice and hear the appellant before issuing the certificate.

The last ground raised in the argument before us is whether the DGIR must send the appellant

the notice of the issue of the certificate under s. 104 (3) of the Act at the time of or soon after the DGIR issues the certificate to the Director of Immigration. We note that although the certificate was issued on 27 June 1988, the notice of the issue of the certificate was given to the appellant only on 16 May 1991. The Director of Immigration had also not taken immediate action on the certificate to stop the appellant from travelling overseas until 22 April 1990. But the fact remains that the appellant knew of the existence of the certificate on 22 April 1990 when he encountered difficulty in renewing his passport.

Section 104(3) of the Act does not impose any time limit within which the DGIR must notify the appellant that a certificate had been issued under s. 104(1) of the Act. That being so, generally the provision of s. 54(2) of the Interpretation Acts 1948 and 1967 (Consolidated and Revised - 1989) would apply. This section states:

> 54.(1) ...
>
> (2) Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.

What is 'convenient speed' has been held by the Courts to mean reasonable time within which an act has to be done, but always having regard to the facts and peculiar circumstances of each case.

We have earlier stated that the object of s. 104(1) of the Act is to prevent the tax payer from leaving the country without paying his outstanding tax. It would be futile if the DGIR were to send to the appellant the notice of the issuance of the certificate unless the DGIR had information that the Director of Immigration had taken the necessary action on the certificate. Here the DGIR was aware that the Director of Immigration had not taken any action on the certificate because the appellant was allowed to leave on overseas travels until 22 April 1990. On this date too, the appellant was told by an Immigration Officer of the existence of the DGIR's certificate. Once the appellant knew of the existence of the certificate, the provision of s. 115 of the Act would apply to him. This section states:

> 115. (1) Any person who, knowing that a certificate has been issued in respect of him under s. 104, voluntarily leaves or attempts to leave Malaysia without paying all the tax, sums and debts specified in the certificate or furnishing security to the satisfaction of the Director General for the payment thereof shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.
>
> (2) A police officer or immigration officer may arrest without warrant any person whom he reasonably suspects to be committing or about to commit an offence under this section.

For the reasons stated, we are of the view that the delay in the service of the notice under s. 104(3) of the Act on the appellant is not fatal so as to render the certificate null and void. To hold otherwise would only defeat the object and purpose of s. 104, and create great inconvenience in the implementation of this section.

Section 104(5) of the Act states:

> 104.(5) No legal proceedings shall be instituted or maintained against the Government, a State Government, a police officer or any other public officer in respect of anything lawfully done under this section or section 115(2).

Since we find that the certificate had been lawfully issued by the DGIR the appellant's application must fail under s. 104(5) of the Act.

We dismiss this appeal with costs to the respondent. We also order that the deposit of RM500 be paid to the respondents to account of taxed costs.